S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SCOTT R. TORPEY, Plaintiff/Counterdefendant-Appellant/Cross-Appellee,	UNPUBLISHED August 14, 2003
v	No. 234956 Wayne Circuit Court
SECREST, WARDLE, LYNCH, HAMPTON, TRUEX, MORLEY, PC, Defendant/Counterplaintiff-Appellee/Cross-Appellant.	LC No. 00-037525-CZ
SECREST, WARDLE, LYNCH, HAMPTON, TRUEX, MORLEY, Plaintiff-Appellee,	
v	No. 234973 Oakland Circuit Court
SCOTT R. TORPEY, Defendant-Appellant.	LC No. 2000-028106-CK

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In these consolidated appeals involving the division of attorney fees between an attorney and his former law firm, Scott R. Torpey, the attorney in question, appeals by right from orders of both the Wayne Circuit Court (Docket No. 234956) and the Oakland Circuit Court (Docket No. 234973). Secrest, Wardle, Lynch, Hampton, Truex, & Morley, PC (SWL), Torpey's former law firm, cross-appeals from the Wayne County action. With respect to the Wayne County action, Torpey challenges the Wayne Circuit Court's denial of his motion for summary disposition as well as its grant of summary disposition to SWL, while SWL challenges the Wayne Circuit Court's ruling that a referral fee must be paid out of the attorney fees as a whole before a division of the remaining fees between SWL and Torpey can be made. With respect to the Oakland County action, Torpey again challenges the grant of summary disposition to SWL.

We reverse in part but affirm the denial of attorney fees in Docket No. 234973. In Docket No. 234956, we affirm.

Background Facts

These appeals involve a determination of the validity and enforceability of a fee sharing provision in Torpey's employment agreement with SWL. When Torpey began work with SWL in 1994, he signed an employment agreement that included, among other things, a fee-splitting provision that would take effect should Torpey leave and take any of SWL's clients. The provision reads, in pertinent part, as follows:

> (a) In the event that a Firm Client shall, subsequent to the Termination, choose to have an Existing Case handled by Employee, Employee's Firm, or any attorney (herein referred to as a "Referral Attorney") to which such Existing Case has been referred by the Employee or the Employee's Firm, which Existing Case, at the time of the Termination, is pending for trial or awaiting filing, Employee shall immediately reimburse the Corporation for all unreimbursed costs incurred by the Corporation with respect to that Existing case, and shall further, within thirty (30) days after Employee, Employee's Firm or Referral Attorney has collected any fees with respect to such Existing case, pay to the Corporation 50% of such fees.
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> (b) If a Firm Client shall choose to have an Existing Case handled by Employee, Employee's Firm or a Referral Attorney subsequent to the Termination, and such Existing Case is on appeal, without regard to the status of such appeal, or whether the Existing Case has been or will be returned for new trial, the Employee shall immediately reimburse the Corporation for all unreimbursed costs incurred by the Corporation with respect to such Existing Case and shall, within thirty (30) days after Employee, Employee's Firm or a Referral Attorney has collected any fees with respect to such Existing Case, pay the Corporation 50% of such fees.
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> (c) If any time during the period ending two (2) years after the Termination, the Employee, Employee's Firm or a Referral Attorney shall undertake the representation of a Firm Client, on an existing case, Employee shall, within thirty (30) days after the Employee, Employee's Firm or a Referral Attorney has collected any fees with respect to any matter being handled for such Firm Client at the time of Termination, pay the corporation 50% of such fees.

While at SWL, Torpey represented the plaintiffs in two cases, *Saad v Davis* and *Rakipi v Chrysler Corp*, and when he left SWL to join another firm, Torpey took both cases with him. When *Rakipi* subsequently settled, Torpey and SWL disputed how the fees should be divided. SWL insisted on receiving one-half of the attorney fees, while Torpey argued that SWL should receive, on a quantum meruit basis, only those fees pertaining to the time Torpey worked on *Rakipi* on behalf of SWL. Torpey also argued that a referral fee owed to another attorney, Gregory Bill, should first be deducted from the *Rakipi* fees before splitting the remaining fees between Torpey and SWL. Torpey sued in Wayne Circuit Court, arguing, among other things, that the fee-splitting agreement in the 1994 contract was contrary to public policy and thus unenforceable. SWL counterclaimed, seeking declaratory relief that the provision was enforceable and that the Wayne Circuit Court should divide the *Rakipi* proceeds accordingly.

Before the Wayne Circuit Court addressed Torpey's motion for summary disposition, SWL filed an action in Oakland Circuit Court seeking a declaration that the fee-splitting agreement in the 1994 contract applied to any fees obtained in the *Saad* case. SWL moved for summary disposition, while Torpey argued that summary disposition in *his* favor should be granted, partly because the materially same issue was already before the Wayne Circuit Court.

Subsequently, the Wayne Circuit Court granted summary disposition to SWL, holding that the fee-splitting agreement in question was valid and enforceable and that it had not, as argued by Torpey, been superseded by a later employment agreement. The Oakland Circuit Court then agreed with this assessment and granted summary disposition to SWL, ruling, in addition, that a referral fee would be deducted from Torpey's share of attorney fees *after* the division of fees between Torpey and SWL had occurred. After the Oakland Circuit Court's ruling, the Wayne Circuit Court finalized its earlier order by ruling that Bill's referral fee would be deducted *before* the split of fees between Torpey and SWL; the court based this ruling on admissions made by SWL in its answer and counterclaim.

Docket No. 234973

Torpey argues that the Oakland Circuit Court erroneously denied its motion for summary disposition under MCR 2.116(C)(6), given that a case involving materially identical issues was pending in the Wayne Circuit Court. We agree. We review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998);

MCR 2.116(C)(6) provides that summary disposition is appropriate when "[a]nother action has been initiated between the same parties involving the same claim." It is clear that the Wayne County action was pending at the time that the Oakland County action was filed. Moreover, the same parties were involved in both lawsuits. Therefore, the pertinent question is whether the Oakland County action involved the same claim as did the Wayne County action. We conclude that it did.

In *J D Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 597; 386 NW2d 605 (1986), this Court reviewed whether a circuit court erred by failing to grant summary disposition on the basis of a pending action in another circuit court. The Court observed that MCR 2.116(C)(6):

> does not require that all parties and all issues be identical. Rather, the two suits must be "between the same parties" and "involving the same claims." Thus, "complete identity of the parties is not necessary," and the two suits " must be based on the same or substantially the same cause of action." [*Candler, supra* at 598.]

In resolving whether the two actions were the same, the Court noted that "[t]he principal question to be decided in each action is whether Candler satisfactorily fulfilled the contract as it related to removing the air-conditioning unit. Resolution of either action will require examination of the same operative facts." *Id.* at 601.

Here, the operative facts necessary for resolution of both disputes relate to the interpretation of the fee-splitting agreement in the 1994 contract. The question to be resolved is whether the provision is valid and enforceable, and, if it is, how it should be interpreted to account for the paying of any referral fees. We are unconvinced by SWL's argument that because the underlying cases, *Rakipi* and *Saad*, are different, the issues before the different courts are meaningfully different. The court hearing the claim would only have to determine whether the fee splitting provision is enforceable, as opposed to determining the amount of fees at issue. There would be no need to examine how the attorney fees were generated, or why those fees were generated, if the contract was deemed enforceable or valid. The "operative facts" at issue are not dependent on the underlying *Rakipi* or *Saad* cases but rather on an interpretation of the employment contract.

Therefore, the Oakland Court erred by denying Torpey's motion for summary disposition under MCR 2.116(C)(6).

Torpey contends that the Oakland Circuit Court should have granted its motion for attorney fees under MCR 2.114(d). In making this argument, Torpey primarily contends that SWL filed a frivolous complaint in Oakland County, given the existence of the Wayne County case. He also contends that SWL made a false statement in connection with its motion for summary disposition. However, Torpey failed to list the issue of attorney fees in his statement of questions presented on appeal, contrary to MCR 7.212(C)(5). Therefore, we decline to address this issue. See *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000), and *Marx v Dep't of Commerce*, 220 Mich App 66, 81; 558 NW2d 460 (1997). In any event, we discern no violation of MCR 2.114(d).

Because this Oakland Circuit Court action should have been dismissed, we need not address whether the Oakland Circuit Court erred in other respects as argued on appeal; its ruling is void.

Docket No. 234956

Torpey first argues that the Wayne Circuit Court erred in granting summary disposition to SWL because the fee-splitting agreement in question is unenforceable as contrary to public policy. For this proposition, he primarily relies on an informal ethics opinion of the State Bar of Michigan. We decline to find this ethics opinion dispositive because our holding today is directly controlled by the case of *McCroskey, Feldman, Cochrane & Brock PC v Waters*, 197 Mich App 282; 494 NW2d 826 (1992).

In *McCroskey*, a director of the law firm left his firm, taking client files with him. *McCroskey, supra* at 283-284. The fee-splitting arrangement in place stated that any attorney who took firm cases when he left the firm must repay all costs, as well as a percentage of the fees, to the law firm. *Id.* at 283-284. The percentage varied according to whether the cases in question were "pending for trial or awaiting filing" or "on appeal." *Id.* at 284. This Court considered whether the fee-splitting arrangement was unenforceable because it violated the rules of professional conduct and was thus contrary to public policy. *Id.* at 286. The Court held that the agreement was enforceable. *Id.* at 286-288.

The *McCroskey* Court began by noting that the fee-splitting provision did not violate MRPC 1.5(e), because the concerns of the rule, "brokering," protection of "a client from clandestine payment and employment," and prohibition of "aggrandizement of fees," were not presented by the agreement. *Id.* at 286-287. The Court held that the agreement was "simply a mechanism for dividing an already existing fee" and sought to eliminate "time-consuming squabbles that formerly arose when plaintiff's entitlement to its fair share of any fee generated by a departing client's file was determined on a quantum meruit basis." *Id.* at 287. Moreover, the Court determined that the ex-director's contention that the contract impaired his ability to practice law was unpersuasive. *Id.*

The Court further stated that

> . . . the contract reasonably assigns to plaintiff a ratable proportion of a given fee on the basis of the stage of the litigation at the time of departure. Although the percentages are arguably imperfect, we do not deem it appropriate to require precision. The contract is a reasonable attempt to relate plaintiff's fee entitlement to the amount of work done on a given file before it left the firm. We hold that the contract at issue does not violate MRPC 1.5(e) or 5.6(a). [*McCroskey*, *supra* at 287-288.]

The *McCroskey* Court's analysis is directly applicable to the instant case and is binding on us under MCR 7.215(I)(1). The fee-splitting arrangement at issue in the instant case is an attempt to relate SWL's fee entitlement to work done on a case before leaving the firm. While the instant case assigns a fifty-percent split regardless of the stage of litigation, we do not deem the lack of variation in percentages to be dispositive. The thrust of *McCroskey* is that a fee-splitting arrangement mandating that a percentage of fees obtained by a departing attorney for former firm cases be given to the firm – as a way to compensate the firm for its work – simply is not void as against public policy.

We reject Torpey's additional attempts to distinguish *McCroskey*. Contrary to Torpey's suggestion, the *McCroskey* Court did not indicate that only those fees attributable to the departing attorney's work on the cases while still with the law firm would be payable to the firm. Indeed, the fee-splitting arrangement upheld in *McCroskey* clearly applied to work performed after the attorney left the firm. The *McCroskey* Court's reference to "a reasonable attempt to relate plaintiff's fee entitlement to the amount of work done on a given file before it left the firm" related to the percentages being an approximation of what the firm should be paid out of the total attorney fees collected. The Court explicitly noted that the fee-splitting arrangement was intended to *eliminate* the need for a quantum meruit analysis. *Id.* at 287.

Nor, contrary to Torpey's suggestion on appeal, was the *McCroskey* Court's holding dependent on either (1) the fact that the departing attorney in that case had helped to draft the fee-splitting agreement or (2) the fact that accurate billing records were unavailable in

McCroskey. *McCroskey* is directly applicable to the instant case and mandates that we uphold the Wayne Circuit Court's ruling.[1]

Torpey next argues that the Wayne Circuit Court erred in failing to rule that a subsequent work-related contract signed by Torpey in 2000 completely superseded the 1994 agreement and the fee-splitting provisions contained in it. The court, in responding to this argument, ruled that the two documents could be read together, that they were complementary and not contradictory, and that the 2000 contract therefore did not supersede the 1994 contract. We agree.

As noted in *Omnicom v Geonetti Investments*, 221 Mich App 341, 346; 561 NW2d 138 (1997), "If parties to a prior agreement enter into a subsequent contract that completely covers the same subject, but the second agreement contains terms that are inconsistent with those of the prior agreement, and the two documents cannot stand together, the later document supersedes and rescinds the earlier agreement." If the two agreements can be read together consistently and the second agreement does not "delve into the specific . . . matters addressed in the first agreement," then the first agreement is not rescinded. See *id.* Here, the Wayne Circuit Court found no inconsistency between the two documents, and nor do we. The original agreement discussed the fee-splitting arrangement in detail, but the second agreement was silent on the issue. Torpey simply fails to identify any areas of contradiction relating to these two agreements. The trial court correctly ruled that the 1994 employment agreement remained in force.[2]

On cross-appeal, SWL contends that the Wayne Circuit Court erred in ruling that Bill's referral fee must be taken out of the attorney fees initially, before the remaining fees are split between SWL and Torpey. The trial court ruled that SWL was estopped from obtaining relief to the contrary, and we agree.

SWL's countercomplaint in the Wayne County Circuit Court included the following allegations:

> 7. That Torpey entered into a contract with SWL firm at that time whereby the SWL firm would receive 50% of the fee received on the Rakipi case *after payment of costs and after payment of the referral fee to Attorney Bill,* as evidenced by Exhibit A attached to Plaintiff's Complaint;

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[1] We note that the case of *Ecclestone, Moffett & Humphrey v Ogne, Jenks, Alberts & Stuart,* 177 Mich App 74; 441 NW2d 7 (1989) is not applicable to the instant case because no fee-splitting contract existed in *Ecclestone.* We further note that *Ecclestone* is not subject to the provisions of MCR 7.215(I)(1). The informal ethics opinion cited by Torpey is similarly both distinguishable and not subject to the provisions of MCR 7.215(I)(1).

[2] We reject Torpey's argument that a later document circulated by SWL but not signed by Torpey – in which SWL explicitly stated that the terms of the 1994 agreement remained in effect – somehow indicates that the initial 2000 agreement eliminated the fee-splitting provision of the 1994 agreement. Indeed, by circulating the later document SWL was simply attempting to spell out in clear and easy-to-understand terms what was already apparent based on case law, i.e., that the terms of the 1994 agreement remained in effect.

> 8. That the employment contract between Torpey and SWL above referred to governed the division of fees on the Rakipi and other cases which Torpey undertook to handle after his departure from SWL . . . . [Emphasis added.]

Accordingly, SWL admitted that the attorney fees were to be split between SWL and Torpey *after* Bill's referral fee had been paid. SWL maintains that it was merely stating two allegations in the alternative in paragraphs seven and eight above. We disagree: one paragraph describes the effect of a provision of the employment contract, and the other states that the contract governs the relationship. SWL's contention that these are to be viewed as alternative pleadings is meritless. Accordingly, the case law related to alternative pleadings that SWL cites on appeal is inapposite. SWL admitted that it was only entitled to its share of the attorney fees after the costs and referral fees had been paid,[3] and the Wayne Circuit Court ruled accordingly.[4] See, e.g., *Cashaw v Great Lakes Greyhound Lines,* 331 Mich 291, 292; 49 NW2d 183 (1951), and *Chrysler Corp v Majestic Marine, Inc*, 35 Mich App 403, 405-406; 192 NW2d 507 (1971).[5]

Docket Number 234973 is affirmed in part and reversed in part. Docket No. 234956 is affirmed.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

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[3] Although it is not vital to our decision, we note that Torpey's complaint in the Wayne Circuit Court action stated:

> By letter dated September 25, 2000, SWL rejected Torpey's offer and stated that the offer was "not in accord with the contractual agreements between yourself [Torpey] and our firm [SWL] concerning this case." SWL (through Mr. Wardle) demanded not only reimbursement of the stated costs, but also *"50% of the fee remaining" after payment of the referral fee.*[] [Emphasis added.]

In response to this allegation, SWL asserted, "No contest."

[4] We note that SWL makes a collateral estoppel argument with regard to Bill's referral fee, pointing out that the Oakland Circuit Court had ruled in favor of SWL on the issue. We do not address this argument, considering that the Oakland Circuit Court should have granted summary disposition to Torpey. SWL also suggests that any admissions made in connection with the referral fee apply solely to the *Rakipi* case and not to the *Saad* case. We disagree. As admitted by SWL in its brief on appeal, "the threshold issue – how attorney fees are to be distributed on existing cases that Torpey took with him when he left SWL and on which attorney fees were generated under the terms of the 1994 Employment Contract – is the same in both cases." SWL made a representation regarding how the fees would be divided, and it is bound by that representation.

[5] SWL, by citing a non-binding treatise, has certainly not convinced us that statements made in a complaint or countercomplaint cannot be viewed as admissions.